BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH B. MILLER	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,017,822
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the August 23, 2004 preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found the claimant's accidental injury arose out of and in the course of employment and that claimant provided timely notice to respondent of his accident.

The respondent requests review of whether the claimant's accidental injury arose out of and in the course of employment as well as whether claimant provided timely notice of the alleged accidental injury.

Claimant argues he has sustained his burden of proof and the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a cook at the University of Kansas. On May 1, 2004, the claimant was working at a block party. Coolers had been loaded with meats to take outside to grill. The coolers were placed on carts to transport out to the grills. While lifting a cooler off the cart the claimant experienced a burning sensation and pain in his back.

The claimant did not participate in some of the games that day such as a water slide because his back was hurting. A former co-worker, Domingo Velasquez, testified that he observed claimant lift the cooler and that claimant appeared to be in pain.

The following Monday the claimant told his supervisor that he had hurt his back at the block party. Claimant testified his supervisor did not fill out an accident report. Claimant testified he repeatedly told his supervisor of the incident on the three following days and also informed another supervisor. The co-worker who testified that claimant appeared to have hurt his back at the block party also testified claimant's supervisor would not fill out accident reports.

The supervisors that claimant identified as having received notice of the injury did not testify. Instead, the Associate Director for Administration of the KU Department of Student Housing testified regarding an investigation conducted into claimant's complaints about not being able to file an injury report. The Associate Director agreed he did not have any personal knowledge whether claimant had notified the supervisors of the accident.

It is not entirely clear but the testimony of the Associate Director as well as a letter summarizing the investigation into claimant's complaint indicate that claimant's supervisor agreed claimant had complained on May 17, 2004 of an accident on May 15, 2004. But claimant did not work on the 15th. Claimant explained the reason he gave the May 15, 2004 accident date was because he could not remember when the block party occurred and when he asked another employee when the block party had occurred he had been mistakenly given that date.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2]

[1] K.S.A. 44-501(a).

[2] K.S.A. 2003 Supp. 44-508(g).

An accidental injury is compensable where the accident arose out of and in the course of employment.[3] The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.[4]

Respondent argues claimant failed to prove he suffered accidental injury arising out of and in the course of his employment. Claimant testified describing a lifting incident at work that caused back pain. A co-worker corroborated claimant's description of the lifting incident. There is no one from respondent who denies claimant performed the job duties he described. Although respondent's brief alleges claimant gave a different description of the onset of his back pain on May 17, 2004, the claimant testified he did not remember providing that version and the supervisor did not testify. The Board, therefore, finds claimant has met his burden of proof that he suffered accidental injury arising out of and in the course of his employment on May 1, 2004.

The Workers Compensation Act requires workers to give notice of their accidental injury within 10 days of when it occurs. But that 10-day period may be extended to 75 days if the worker has just cause for failing to notify the employer within the initial 10-day period following the accident.[5]

The claimant alleged injury on May 1, 2004, and testified he gave his supervisor notice of the accidental injury not only on May 3, 2004, but also on each of the three days after that date. That testimony was not contradicted by the supervisors claimant said he told. The claimant has met his burden of proof to establish that he provided timely notice.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.[6]

WHEREFORE, it is the finding of the Board that the Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated August 23, 2004, is affirmed.

IT IS SO ORDERED.

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[3] K.S.A. 44-501(a).

[4] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

[5] See K.S.A. 44-520.

[6] K.S.A. 44-534a(a)(2).

Dated this _____ day of October 2004.

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BOARD MEMBER

c: Sally G. Kelsey, Attorney for Claimant
Marcia L. Yates, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director